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No. 92-419

IN THE

Supreme Court of the United States

ADMINISTRATOR OF THE NEW YORK CITY DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

- against -

ABBOTT HOUSE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 1, 1992

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QUESTION PRESENTED

May attorney's fees be awarded pursuant to 42 U.S.C. § 1988 to intervenors whose rights have not been violated, to be paid by a defendant who has done that party no wrong?

PARTIES

Petitioners are the Administrator of the New York City Human Resources Administration; the former Administrator, Blanche Bernstein in her individual capacity; The City of New York; The New York City Department of Social Services; Beverly Sanders individually and in her former capacity as Administrator of Special Services for Children;[1] Carol Parry, Elizabeth Beine, and Linda Marino, individually and in her former capacity as Director of the Office of Allocations and Accountability of Special Services for Children, Paula Rabinow, individually and in her former capacity as Director of the Joint Planning Service, Sandra Howard, individually and in her former capacity as Supervisor of the Central Referral Unit and the Comptroller of the City of New York.

Respondents are Abbott House, Berkshire Farm Center & Services for Children, Brooklyn Home for Children, Brookwood Child Care, Episcopal Mission Society, Green Chimneys Children's Mission Service, Heartsease Home, Inc., Inwood House, Lakeside School, Louise Wise Services, Lutheran Community Services, Puerto Rican Family Association, St. Christopher-Jennie Clarkson Child Care Services, Sheltering Arms Children's Service, Society for Seaman's Children, Spence Chapin Services to Children, Talbot Perkins Children's Services, The Children's Aid Society and The Children's Village.

None of the plaintiffs below and none of the defendants below except the City of New York, its agencies and its employees are parties to this proceeding.

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[1] The New York City agency Special Services for Children no longer exists; its functions have been replaced by the Bureau of Child Welfare.

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ABBOTT HOUSE, *et al.*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, the Administrator of the New York City Department of Human Resources, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 3, 1992, which, upon reargument, vacated its previous judgment and ordered payment of attorneys' fees to the respondents.

OPINIONS BELOW

The opinion of the Court of Appeals on reargument has not yet been reported. It is reprinted in the Appendix at A-1. The prior opinion of the Court of Appeals, which reversed the District Court's award of fees and gave judgment to petitioners is reported at 944 F.2d 1028. A copy is reprinted in the Appendix at A-23. The opinion of the United States District Court for the Southern

District of New York (Ward, J.) is reported at 725 F. Supp. 1324 and is reprinted in the Appendix at A-45.

JURISDICTION

The District Court ordered petitioners to pay attorneys' fees to respondents by judgment dated June 29, 1990 (A-51). The Court of Appeals reversed and dismissed the application for attorneys' fees by judgment and decision filed September 24, 1991 (A-26). On timely application for reargument, the Court of Appeals on June 3, 1992 vacated its prior opinion and issued a new opinion remanding this matter to the District Court for calculation of the fees (A-1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A group of black Protestant children challenged the constitutionality of New York City's foster care system in *Wilder v. Bernstein* in 1973. The plaintiffs claimed, *inter alia*, that the City's system of offering the bulk of its foster care through placements with private, religiously affiliated agencies discriminated on the basis of race and religion and violated their rights to free exercise of religion. The defendants included New York City and the religiously affiliated child care agencies. The plaintiff class was certified in 1980 with the New York Civil Liberties Union Children's Rights Project representing the class. *Wilder v. Bernstein*, 499 F. Supp. 980 (S.D.N.Y. 1980).

After ten years the City and plaintiffs negotiated a settlement of the litigation. The defendant private child care agencies objected to the settlement, as did respondents, a group of non-sectarian child care agencies. None of the respondents were parties to the litigation although some had been defendants at an earlier point in the proceedings.

Respondents wrote the Court in 1984 asking that they be allowed to intervene (JA-403).[2] Respondents did not specify whether they sought to intervene as plaintiffs and did not file a complaint. The District Court ordered that "the intervenors are hereby made parties to this cause for the limited purpose of opposing the proposed settlement now pending before this court..." (W-43). Judge Ward later characterized the intervenors' participation as limited to clinical issues: "[T]he intervenors ... joined the lawsuit for the sole purpose of objecting to the Stipulation on clinical grounds." *Wilder v. Bernstein*, 645 F. Supp. 1292, 1350 (S.D.N.Y. 1986).

The intervenors' clinical objections were numerous. They included the proposed system for ranking child care agencies according to their quality of care, the City's authority over referral of children for placement, and the increase in already burdensome paperwork. These clinical objections were described in 91 pages of the intervenors' legal memoranda (JA-33-81, 96-137) and voluminous affidavits (W 1643-1900). The agencies also argued that one aspect of the settlement would unconstitutionally deprive foster children of their First Amendment rights (JA 70-76, 133-36). The same arguments were raised by the defendant sectarian child care agencies (W 1609-13).

The intervenor and defendant agencies joined the negotiations, using the intervenors' proposals as a negotiating basis, and a final settlement agreement was

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[2] Citations to the Appendix to this Petition are preceded by "A". Citations to the Joint Appendix submitted to the Second Circuit Court of Appeals are preceded by "JA". Citations to the Joint Appendix submitted to the Court of Appeals in connection with the appeal from the consent decree embodying the *Wilder* settlement are preceded by "W".

reached. 645 F. Supp. at 1347-48. The District Court described the result:

> The general outlines of the Stipulation now before the Court do not differ greatly from those of the original settlement.... Within this broad outline, however, the Stipulation reflects numerous changes ... that address virtually all of the concerns raised by the intervenors and other child care administrators and clinicians who commented on the original settlement proposal.

645 F. Supp. at 1348.

In a lengthy opinion explaining why it approved the *Wilder* settlement, the Court emphasized that it had found the intervenors' participation important precisely because the intervenors had no legal interest at stake in the litigation. Judge Ward quoted the intervenors' own papers to emphasize their exclusively clinical concerns:

> As the intervenors attested, they '[had] no axes to grind.' ... Their expressed purpose was to measure the settlement proposal against the 'sole standard' they considered relevant -- whether it furthered the best interests of children in foster care.

645 F. Supp. at 1346-47. The Court also emphasized that the intervenors had no interest in the legal dispute between the parties:

> [Because the intervenors were] nonparties vis-a-vis the underlying constitutional claims in the lawsuit, [they] are the sole participants in this litigation who have been in a position to address freely and undistractedly ... child care concerns....

Wilder v. Bernstein, 645 F. Supp. at 1350.

The District Court entered the settlement as a consent decree, over the objection of the defendant agencies, and the Court of Appeals affirmed the settlement. *Wilder v. Bernstein*, 848 F.2d 1338 (2d Cir. 1988).

The intervenors moved pursuant to 42 U.S.C. 1988 for the City to pay their attorneys' fees in 1989.[3] The City argued in opposition that the intervenors were not a prevailing party because they had no federal constitutional or statutory rights at stake in the litigation. By judgment dated June 29, 1990, the District Court ordered the City to pay the intervenors over $365,000 in fees and disbursements (JA-450).

The District Court Opinion

The District Court held that because the intervenors "facilitated the formation of a settlement which would safeguard the constitutional rights of the children in the city's care, while assuring that the child care system itself would remain focused on the overall best interests of the children entitled to the protection of the civil rights laws," their attorneys' fees were compensable. 725 Supp. at 1331. Additionally, the Court reasoned that the intervenors had raised objections addressed to constitutional and civil rights issues and many of the modifications they obtained in the settlement proposal "went directly to benefit the children in the child care system." The Court concluded that the intervenors were entitled to fees because they had "helped to vindicate the civil rights of the children and families in the foster care system..." *Id.* at 1332.

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[3] The City paid plaintiffs' attorneys $1,775,00 in fees and costs for their work up to that point. *Wilder*, 725 F. Supp. 1324, 1327, n. 2. Payments continue to date for work on enforcement of the consent decree.

The First Opinion of the Second Circuit Court of Appeals

The Second Circuit Court of Appeals reversed, in an opinion by Judge Cardamone, with Chief Judge Oakes dissenting. The Court held that 42 U.S.C. § 1988 only authorized payment of fees to parties asserting their own civil rights:

> Legislative history supports the view that though intervenors may be prevailing parties, it is only when they assert their own civil rights that they are so considered. Congress planned on having § 1988 serve as a mechanism for vindicating the rights of those whose civil rights had been violated, not for forwarding civil rights in general.

944 F.2d at 1033.

The Court noted that respondents' interests were vitally affected by the proposed *Wilder* settlement and that they did not need the incentive of a fee award to become involved in the litigation:

> [N]o member of the intervenor group has asserted any civil rights interests of its own. Instead, intervenors became involved initially in the instant litigation because of their fear both that administrative burdens imposed by the original proposed settlement would make the foster care system even more unworkable than the record shows it presently is, and also give rise to those clinical concerns that the list of intervenors' objections in the trial court reveals, *see* 645 F.Supp. at 1346-47. On that score alone intervenors would doubtless have entered the settlement negotiations regardless of whether attorney's fees were available.

944 F.2d at 1034.

The Court rejected the argument that the intervenors were entitled to fees because they acted to benefit children in foster care:

> [I]ntervenors cannot be said to be the legal custodians or guardians of the children in their care. That responsibility belongs to the appropriate City agency. *See* N.Y. Soc. Serv. Law § 383(2) (McKinney 1983 & Supp. 1991). Thus, it does not appear that intervenors are possessed of any interest that permits them to assert the civil rights of the foster children in their care and to be considered a prevailing party under § 1988.
>
> Finally, we agree with the district court that appellees' efforts were beneficial to the children whose rights were at stake, but the City's earlier nearly two million dollar payment for plaintiffs' attorney's fees was for services that also vindicated the constitutional rights of Protestant Black children, the same constituency intervenors seek to be rewarded for representing.

944 F.2d at 1034.

The Second Opinion of the Court of Appeals

On reargument, the Court vacated its first opinion and held that the intervenors were entitled to a fee award. The Court found no requirement in section 1988 that the prevailing party be asserting its own civil rights. The Court noted that the legislative history of 42 U.S.C. § 1988 referred only to awards of fees to parties asserting their own civil rights but concluded (A-16-17):

> The omission of a reference in that history to the rights of third parties, those permitted to assert the rights of others through the law of *jus tertii*, or associational standing, is not dispositive....

> The legislative history does not express an intent so clearly contrary to the statute that it can support a conclusion more limited than the ordinary meaning of the statutory language used, one, moreover, in conflict with the broad remedial purpose of § 1988. *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The Court decided that the intervenors could be characterized as prevailing parties under section 1988 because the *Wilder* litigation (A-19):

> implicated interests or common legal or factual questions involv[ing] violations of civil rights protected by the Constitution or federal statutes enumerated under § 1988, and because the efforts of the intervenors contributed importantly to the creation of remedies Congress sought to advance in the fee statute

The Court remanded the fee award to the District Court to exclude "efforts by counsel for intervenors that merely duplicate those of the plaintiffs in effectuating the foster care children's civil rights" (A-19-20). For the future, the Court cautioned that work done by "parties whose intervention produces results that are unrelated to remedying violations of civil rights are not eligible for fees" (*id.*). However, once intervenors raise a civil rights argument, they are entitled to fees even though they would have participated in the litigation for non-civil rights reasons (A-21): "[W]here a party has mixed motives for intervening..., the non-duplicative attorneys' fees attributable to the efforts expended in pursuit of civil rights remedies may be recovered."

REASONS TO GRANT THE WRIT

1. AWARDING ATTORNEYS' FEES TO INTERVENORS WHOSE RIGHTS WERE NEVER VIOLATED CONFLICTS WITH THIS COURT'S DECISIONS BY BREAKING THE CONNECTION BETWEEN LIABILITY ON THE MERITS AND LIABILITY FOR FEES. THE ADOPTION OF THIS RULE WILL ENGENDER UNNECESSARY COMPLEXITY IN CIVIL RIGHTS LITIGATION AND BURDEN PUBLIC TREASURIES WITHOUT ADVANCING THE PURPOSE OF THE ATTORNEYS' FEES ACT.

The rule announced by the Second Circuit authorizes an award of fees to a party even though the party does not claim that the defendant violated its rights. This breaks

> the crucial connection between liability for violation of federal law and liability for attorney's fees under fee-shifting statutes.

Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754, 762 (1989). Having unmoored liability for fees from liability on the merits, the Second Circuit has turned 42 U.S.C. § 1988 into a vehicle for the advancement of civil rights interests in general, even though the party awarded a fee did not have its civil rights violated and even though the defendant is innocent of any wrongdoing to the party awarded the fee.

The opinion below recognizes the confusion likely to be created by this novel interpretation of the statute. Intervenors will be able to piggyback onto existing civil rights litigation and argue that the defendant must pay their fees, even though they do not claim that the defen-

dant violated their rights (A-20). All it will take is the advancement of a constitutional argument on behalf of someone's interests, and the intervenor will be able to obtain fees for advancing its non-civil rights interests. *See* A-21 (instructing District Court to award fees for "mixed motive" work).

Institutional reform litigation commonly affects groups who do not have a claim that is covered by an attorneys' fee award statute. Mental health professionals have an interest in litigation over patients' right to refuse treatment, prison guards are interested in preventing inmates' exposure to tuberculosis and, as in the case at bar, private child care agencies are interested in litigation over discrimination in the foster care system. To date, it has been common for such groups to offer their expertise by participating as *amici*. *See, e.g., Jose P. v. Sobol*, 79 Civ 270 (E.D.N.Y.) (teachers' union has participated as *amicus* for over ten years in litigation over the provision of special education). The opinion below will stimulate such groups to air their grievances through intervention rather than by offering their expertise as non-parties, now that they can obtain attorney's fees. This will clutter the main litigation with non-civil rights issues and force the defendants to oppose the groups' participation, since the fee awards will certainly be costly, even though their participation might be beneficial to creation of a more practical remedy.

An award of fees to intervenors in civil rights litigation who lack a civil rights claim is contrary to the statutory language and legislative history. The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, authorizes the award of fees to a prevailing party in actions to enforce the civil rights laws. Section 1988 was enacted in order to encourage "private citizens ... to be able to assert their civil rights...." Senate Report No.

1011 (1976) *reprinted in* 1976 U.S. Code Cong. & Admin. News 5910. *See generally Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983): "The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." There is nothing in the statutory language or legislative history to authorize an award of fees to parties who do not sue "to assert their civil rights." Senate Report No. 1011 (1976).

The use of the term "prevailing party" presupposes that the party who prevails wins in his or her own interest, not on behalf of someone else. This Court has repeatedly held that fees may not be awarded for advancing the cause of civil rights in general. *See Rhodes v. Stewart*, 488 U.S. 1 (1988) (prevailing party must have obtained benefit for himself, insufficient to obtain benefit for others); *Hewitt v. Helms*, 482 U.S. 755 (1987) (prevailing party must have changed defendants' conduct towards him or her). Instead, this Court's opinions on the attorneys' fees statutes routinely assume that the parties seeking fees would be seeking reimbursement for the costs of vindicating their own claims. *See, e.g., Kay v. Ehrler*, __ U.S. __, 111 S.Ct. 1435, 1437 (1991) (purpose of section 1988 "was to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights."); *Hewitt v. Helms*, 482 U.S. at 760 (to be a prevailing party plaintiff must "receive at least some relief on the merits of his claim").

It does not advance the purposes of the civil rights acts to award fees to intervenors without a civil rights claim. They have not been injured in any way that the civil rights acts seek to redress. *Compare Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (purpose of providing attorneys' fees is "to encourage individuals injured by racial discrimination to seek judicial relief"). The purpose of the attorneys' fees statute is served once

the plaintiffs bring their lawsuit; as long as the intervenors are not also suing to vindicate their own rights, their interest in the litigation is unrelated to the Congressional purpose of encouraging injured parties to seek relief and no fee award is proper. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975).

In the usual case intervenors without a civil rights claim of their own do not need the incentive of a fee award to be encouraged to join civil rights litigation. In this case, the first opinion by the Court of Appeals noted that the respondents "would doubtless have entered the settlement negotiations regardless of whether attorney's fees were available," 944 F.2d at 1034, since their institutional interests as foster care providers would be profoundly affected by a remedy that reworked the guidelines for the foster care system. Therefore, even as a practical matter, it is unnecessary to offer the carrot of a fee award to encourage the groups who might be affected by a potential remedy to join civil rights litigation.

Such intervenors may have an important contribution to make to the creation of a remedy, especially when the intervenors are neutral regarding the legal issues. In the merits stage of this litigation the District Court Judge characterized respondents' involvement as invaluable because "they '[had] no axes to grind'" and were "nonparties vis-a-vis the underlying constitutional claims in this lawsuit." 645 F. Supp. at 1346-47. No matter how valuable this contribution, however, it is not compensable under section 1988. That statute limits fee awards to parties who have an ax to grind, specifically to parties with a constitutionally based grievance.

In raising a constitutional argument on behalf of children in foster care, the same group comprising the plaintiff class, the agencies acted as volunteers. They did not represent a class of children; the children already constituted a class and had class counsel. *See Wilder v. Bernstein*, 499 F. Supp. 980 (S.D.N.Y. 1980) (certifying plaintiff class with the Children's Rights Project as class counsel). The intervenors did not represent parents of children in foster care; they never sought to represent this class' interests. Therefore any change they brought about in the settlement that advanced these groups' constitutional rights is not compensable. *See Hewitt v. Helms, supra.* Instead, they acted as litigating *amici* , presenting a legal argument to the Court on behalf of another.[4] Such a group's participation may be valuable, but without a compensable interest in the litigation, no fees should be awarded. *See Morales v. Turman*, 820 F.2d 728 (5th Cir. 1987) (no fees for *amici*).

2. THE OPINION BELOW CONFLICTS WITH THE APPROACH TO FEES FOR INTERVENORS TAKEN BY OTHER CIRCUITS.

The opinion below conflicts on two different grounds with the approach taken by other Circuits to fee awards for intervenors. First, other Circuits have held that fee awards to intervenors are subject to greater scrutiny than awards to plaintiffs. *See Donnell v. United States*, 682 F.2d 240, 247-49 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983); *Posada v. Lamb County, Texas*, 716 F.2d 1066, 1074-75 (5th Cir. 1983); *American Booksellers*

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[4] Respondents represented themselves as more "akin to amici" than to parties in their brief defending the consent decree before the Second Circuit. Brief of Intervenors at 2.

Assoc., Inc. v. Hudnut, 650 F. Supp. 324, 332 (S.D. Indiana, 1986). The opinion below turns that doctrine on its head and awards fees to intervenors even though they could not obtain an award for advancing the same claim in an independent action. Intervenors should not have more liberal rights to recovery of attorneys' fees than plaintiffs.

Intervenors with a fee paying claim should be able to obtain fees because they would be entitled to them if they were to raise their claim in separate litigation. Accordingly, various Circuit Courts of Appeal have upheld awards of fees to intervenors who have a fee generating claim in the litigation. *E.g. Afro-American Patrolmen's League v. City of Atlanta*, 817 F.2d 719 (11th Cir. 1987) (intervening white police officers alleging racial discrimination awarded fees); *Commissioners Court of Medina County, Texas v. United States*, 683 F.2d 435 (D.C. Cir. 1982) (intervening Mexican-American voters alleging violation of Voting Rights Act awarded fees); *Seattle School District No. 1 v. State of Washington*, 633 F.2d 1338 (9th Cir. 1980), *aff'd on other grounds*, 458 U.S. 457 (1982) (intervening organizations defending school desegregation plan on behalf of members and their children awarded fees).[5]

This rationale is inapplicable to intervenors who lack an independent fee paying claim. If they were to bring an independent action, no fee award would be possible. *See Smith v. Robinson*, 468 U.S. 992 (1984) (prevailing party with claim under statute that does not provide for fee shifting may not be given attorneys' fee

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[5] The intervenor groups in *Seattle School District* were described by the District Court as including members with children in Seattle schools. The intervenors sued on behalf of those members and on their own behalf. *Seattle School Dist. v. State*, 473 F. Supp. 996, 1000 (W.D. Wash. 1979).

award); *Gagne v. Town of Enfield*, 734 F.2d 902 (2d Cir. 1984) (fee award not authorized for plaintiff who prevails only on non-fee generating claim).

Accordingly, the District of Columbia Circuit has imposed the requirement that awards to intervenors be based on a finding that the intervenors had a civil rights claim. *Miller v. Staats*, 706 F.2d 336, 342 (D.C. Cir. 1983). *Miller* was a Title VII employment discrimination suit brought by a class of black and female employees. The intervenors, a class of white male employees, joined the litigation to seek a revision of a proposed consent decree so that it did not discriminate against them. On appeal the court held that the intervenors could be awarded a fee if they "allege a claim that is colorable under the civil rights laws." In contrast, the Second Circuit has now upheld an award to intervenors even though they do not allege a colorable claim under the civil rights laws.

The Second Circuit's approach also conflicts with those Circuits that have held that before intervenors may be awarded fees, the court must determine whether the intervenors acted as plaintiffs or defendants. *See League of United Latin American Citizens v. Clements*, 923 F.2d 365, 367-68 (5th Cir. 1991) (*en banc*); *Reeves v. Harrell*, 791 F.2d 1481, 1484 (11th Cir. 1986). These Circuits have held that an intervenor's status must first be analyzed to determine whether the restrictive *Christiansburg* standard applies to their fee application. *See Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 422 (1978) (fees may not be awarded to defendants as prevailing parties unless the claim was "frivolous, unreasonable or groundless"). The Second Circuit instead ignored the question of the agencies' status in the litigation.[6]

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[6] The agencies never specified whether they were intervening as

(Footnote Continued)

If the court had analyzed the question, it might have been hard pressed to uphold the fee award; respondents opposed plaintiffs' position and the very same constitutional arguments raised by respondents were also raised by the defendant child care agencies (JA 70-76, 133-36, W 1609-13). Thus, by avoiding the question deemed determinative by the Fifth and Eleventh Circuits, the lower court never confronted the question of why respondents should be awarded fees for making the same legal arguments as the defendant agencies, without being held to the *Christiansburg* standard. Moreover, the court never had to address the question of why New York City should have to pay both plaintiffs' fees for opposing respondents and respondents' fees for opposing plaintiffs.

3. THE LOWER COURT'S STANDARD FOR FEE AWARDS IS NOT WORKABLE AND WILL INEVITABLY GENERATE SATELLITE LITIGATION OVER FEES.

This Court has cautioned that it has set fee standards to avoid a "second major litigation" over fees. *Hensley, supra*, 461 U.S. at 433. *See also City of Burlington v. Dague*, __ U.S. __, 112 S.Ct. 2638, 2643 (1992); *Texas State Teachers Assoc. v. Garland Independent School Dist.*, 489 U.S. 782, 791 (1989). The Second Circuit's standard for awarding fees to intervenors who lack a compensable claim of their own violates this Court's standards because it is exceedingly complex and is likely to generate significant litigation over fees.

(Footnote Continued)
plaintiffs or defendants. Without directly confronting the issue, the District Court Judge termed them defendants during the fairness hearing (W-2663).

The court below held that when a party with "mixed motives" for intervening seeks fees, the District Court must first determine whether the attorney's efforts were "in pursuit of civil rights remedies" or "advanced non-civil rights concerns." The District Court must then determine whether the attorney's time spent advancing non-civil rights concerns "concomitantly advanced" civil rights concerns. Fees may be awarded for any efforts that had the effect of advancing "civil rights concerns" individually or together with non-civil rights concerns (A-21).

This inquiry is similar to the "central issue" test that this Court rejected in *Garland*. Yet unlike the one central issue that had to be divined in *Garland* the Second Circuit has created a multiple central issue test. Under the rule established below, District Courts must decide the motive for each action taken by attorneys for the intervenors and then determine its effect before deciding whether each unit of time is compensable. Inquiries into motives are notoriously difficult and determining whether each hour of attorney time had the effect of advancing civil rights is likely to be equally time consuming. Given the sums of money at stake,[7] litigation over the motive and effect of counsels' actions will be hard fought. As this Court warned in *Garland*, such a test "will spawn a second litigation of significant dimension," 109 S.Ct. at 1493, and has no place in attorneys' fees litigation.

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[7] Plaintiffs' counsel was paid almost two million dollars in settlement of their initial fee application and the District Court ordered intervenors paid over $360,000. Fees payments will likely continue for years to cover enforcement of the consent decree.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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